HUAWEI TECHNOLOGIES (MALAYSIA) SDN BHD v. MAXBURY COMMUNICATIONS SDN BHD & ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
TENGKU MAIMUN TUAN MAT JCA
NALLINI PATHMANATHAN JCA
ZABARIAH MOHD YUSOF JCA
[CIVIL APPEALS NO: W-02(NCVC)(A)-776-04-2017 &
W-02(NCC)(A)-1429-07-2017]
14 MARCH 2019

ARBITRATION: *Award – Setting aside – Appeal against – Whether award dealt with dispute not contemplated by or not falling within terms of submission to arbitration within meaning of s. 37(1)(a)(iv) of the Arbitration Act 2005 – Whether liable to be set aside – Whether case fell within purview of s. 37(3) of Arbitration Act 2005 – Whether decision making process of arbitrator could be faulted – Whether there arose 'a new difference' or 'a dispute not contemplated within terms of submission to arbitration' – Whether there was factual basis for complaint under s. 37(2)(b) of Arbitration Act 2005 – Whether there was breach of justice – Whether intervention of court warranted*

Two appeals herein emanated from arbitration awards which were set aside by the High Court. Since both appeals concerned the application of the same provisions of the Arbitration Act 2005 ('AA 2005'), they were heard together. The background facts were that the defendant, Huawei Technologies (Malaysia) Sdn Bhd ('Huawei'), entered into an agreement with Maxis Broadband Sdn Bhd ('Maxis') for the provision of the next generation broadband project in Malaysia. For the purposes of carrying out the project, Huawei entered into an agreement ('the purchase agreement') with the plaintiff, Maxbury Communications Sdn Bhd ('Maxbury'). Under the definitions clause of the purchase agreement, it stipulated that Maxbury would begin work after receiving a purchase order ('PO') from Huawei. The purchase agreement clearly stipulated that the quantity of OLTs for the fundamental planning was to be 32. Huawei issued the relevant POs. However, when the works were submitted to Huawei, Maxbury represented that there were 60 OLTs in addition to the stipulated 32 OLTs ('the 60 additional OLTs'). Pursuant to invoices issued by Maxbury, Huawei paid Maxbury in full for the 32 OLTs, amounting to RM1.177 million. Huawei then raised a dispute in relation to the additional 60 OLTs. The parties achieved an amicable settlement in the form of a settlement agreement. Pursuant to the settlement agreement, Huawei paid Maxbury the sum of RM1.2 million for the 60 additional OLTS being full and final settlement of all Huawei's liabilities towards Maxbury. Subsequently, after Huawei paid the full and final settlement sum to Maxbury, Maxbury instituted a civil suit ('Suit No 16') against Huawei, claiming a sum of RM2.14 million purportedly owed to it by Huawei under the settlement agreement. Huawei

obtained a stay of Suit No. 16 in order for the dispute to be referred to arbitration, pursuant to cl. 9 of the settlement agreement. Maxbury pointed to cl. 4 of the settlement agreement in support of its contention that there was a representation that Maxbury would be entitled to a further RM2.14 million. Essentially, it was contended for Maxbury that there came into existence a collateral agreement and the basis for their claim was premised on the existence of such a collateral agreement. Huawei opposed Maxbury's claim on, *inter alia*, the following grounds (i) the terms of the settlement agreement did not impose any obligation or liability upon Huawei to pay Maxbury an additional RM2.14 million since pursuant to cl. 2 and cl. 3 of the settlement agreement, payment of RM1.2 million was in full and final settlement of all Huawei's liabilities, payments and obligations; and (ii) the additional RM2.14 million would only arise if Maxbury offered the services mentioned in cl. 4(1) of the settlement agreement. The arbitrator ruled that on a balance of probabilities, Maxbury failed to prove the alleged collateral agreement and held that by virtue of cl. 3 of the settlement agreement, the settlement agreement settled all disputes pertaining to the purchase agreement. Therefore, Maxbury's claim for specific performance of the collateral agreement and compensation *in lieu* of the same was dismissed with costs. The arbitrator stated that Maxbury's claim was premised on the purported collateral agreement and it was not based, in the alternative, on cl. 4 of the settlement agreement. In other words, Maxbury failed to plead an alternative claim in breach of contract premised on the basis of cl. 4. Therefore, the arbitrator held that the arbitral tribunal had to be confined to the issue of whether the collateral agreement as pleaded existed. Maxbury filed an originating summons before the High Court seeking to set aside the arbitration award under s. 37 and/or s. 42 of the Arbitration Act 2005 ('AA 2005'). The High Court Judge held *inter alia* (i) the award dealt with a dispute not contemplated by or not falling within the terms of the submission to arbitration within the meaning of s. 37(1)(a)(iv) of the AA 2005 which made it liable to be set aside; and (ii) the present case did not fall within the purview of s. 37(3) of the AA 2005 and the only option was for the court to set aside the award in its entirety. Hence, this appeal against the decision of the High Court.

Held (allowing appeal with costs)
Per Nallini Pathmanathan JCA delivering the judgment of the court:

(1) The fact that the arbitrator was accused of having failed to consider a material issue comprising an integral part of the dispute referred to arbitration did not form the basis for the contention that the arbitrator had exceeded the scope of the dispute referred to him for arbitration. Conceptually that was not an available avenue for an applicant under s. 37(1)(a)(iv) of the AA 2005. In any event, the arbitrator did indeed consider this issue in the context in which the dispute was put and pleaded before him. The claim was premised on cl. 4 of the settlement agreement, which provided no cause of action for the monies claimed

by Maxbury. The arbitrator had complied with the terms of reference of the arbitration given to him. He answered the issue and gave his reasons for it. There was no question of the award dealing with a dispute that was not contemplated by or not falling within the terms of the submission to arbitration. To that extent, the decision-making process of the arbitrator, which was the true subject of consideration under s. 37(1)(a)(iv) of the AA 2005, could not be faulted. (paras 39 & 40)

(2) Maxbury's claim was really an attempt to have the court review its claim on the substantive merits relating to the existence or otherwise of a collateral agreement. That was not a basis for seeking to set aside an award under s. 37(1)(a)(iv) of the AA 2005. Any error, or perceived error, in the adjudication of the dispute in the award could not, and ought not to be, relied upon by the losing party to set aside the award. It was a fallacy to label the failure to accept the existence of a collateral agreement, or even an incorrect application of the law by the arbitrator, as amounting to a transgression of the arbitrator, such that it could be said that the award handed down dealt with a dispute not contemplated by or not falling within the terms of submission to arbitration. Errors, such as those sought to be put forward by the applicants, even if they had merit, had no nexus with s. 37(1)(a)(iv) of the AA 2005 which dealt with the issue of jurisdiction and not errors of law. (paras 41 & 42)

(3) The High Court Judge erred in her approach and her application of s. 37(1)(a)(iv) of the AA 2005. In such an application, the court should undertake a scrutiny of the reference to arbitration and other relevant documents to ascertain whether the arbitrator had gone well outside the scope of the subject matter of reference to arbitration. The court should not however usurp the position of the arbitrator in determining the merits of the dispute. It ought to be patently clear on such a scrutiny that the dispute fell outside the scope of the submission warranting the intervention of the court. (para 47)

(4) The arbitrator could not be said to have failed or refused to consider a matter referred to him for determination. He had considered cl. 4 and determined that it did not afford a cause of action as there were no particulars of the alleged breach. The arbitrator had concluded that that cause of action had not been made out. It could not be said that this amounted to a 'new difference' or 'a dispute not contemplated or not falling within the terms of submission to arbitration.' There appeared to be no factual basis for the complaint under s. 37(2)(b) of the AA 2005 namely a breach of natural justice. This court was not persuaded that the threshold requirements for this section had been met. (paras 48 & 49)

Bahasa Malaysia *Headnotes*

Dua rayuan ini berasal daripada award-award timbang tara yang telah diketepikan oleh Mahkamah Tinggi. Oleh kerana kedua-dua rayuan berkaitan pemakaian peruntukan-peruntukan yang sama Akta Timbang Tara ('ATT 2005'), kedua-duanya dibicarakan bersama. Latar belakang fakta adalah defendan, Huawei Technologies (Malaysia) Sdn Bhd ('Huawei'), memasuki satu perjanjian dengan Maxis Broadband Sdn Bhd ('Maxis') untuk peruntukan bagi projek jalur lebar generasi akan datang di Malaysia. Untuk tujuan menjalankan projek, Huawei memasuki perjanjian ('perjanjian pembelian') dengan plaintif, Maxbury Communications Sdn Bhd ('Maxbury'). Bawah klausa takrifan perjanjian pembelian, ditetapkan bahawa Maxbury akan memulakan kerja-kerja selepas menerima tempahan belian ('PO') daripada Huawei. Perjanjian pembelian dengan jelasnya menetapkan bahawa kuantiti OLTs untuk perancangan asas adalah 32. Huawei mengeluarkan POs yang relevan. Walau bagaimanapun, apabila kerja-kerja dihantar kepada Huawei, Maxbury menggambarkan terdapat 60 OLTs tambahan kepada 32 OLTs yang ditetapkan ('tambahan 60 OLTs'). Menurut invois-invois yang dikeluarkan oleh Maxbury, Huawei membayar kepada Maxbury sepenuhnya untuk 32 OLTs, berjumlah RM1.177 juta. Huawei kemudiannya membangkitkan pertikaian berhubungan tambahan 60 OLTs tersebut. Pihak-pihak mencapai penyelesaian yang baik dalam bentuk perjanjian penyelesaian. Menurut perjanjian penyelesaian, Huawei membayar Maxbury jumlah RM1.2 juta untuk tambahan 60 OLTs tersebut menjadi penyelesaian penuh dan muktamad liabiliti-liabiliti Huawei terhadap Maxbury. Kemudiannya, selepas Huawei membayar penyelesaian penuh dan muktamad kepada Maxbury, Maxbury memulakan guaman sivil ('Guaman No 16') terhadap Huawei, menuntut jumlah RM2.14 juta kononnya terhutang oleh Huawei bawah perjanjian penyelesaian. Huawei memperoleh penangguhan Guaman No 16 untuk pertikaian dirujuk pada timbang tara, menurut kl. 9 perjanjian penyelesaian. Maxbury merujuk pada kl. 4 perjanjian penyelesaian untuk menyokong hujahannya bahawa terdapat representasi Maxbury berhak memperoleh RM2.14 juta. Pada asasnya, dihujahkan oleh Maxbury terdapat kewujudan satu perjanjian cagaran dan dasar tuntutannya berdasarkan kewujudan perjanjian cagaran sedemikian. Huawei menentang tuntutan Maxbury atas, antara lain, alasan-alasan berikut (i) terma-terma perjanjian penyelesaian tidak mengenakan apa-apa obligasi atau liabiliti atas Huawei untuk membayar tambahan RM2.14 juta kerana menurut kl. 2 dan kl. 3 perjanjian penyelesaian, bayaran RM1.2 juta adalah penyelesaian penuh dan muktamad liabiliti-liabiliti, bayaran-bayaran dan obligasi-obligasi Huawei; dan (ii) tambahan RM2.14 juta hanya akan timbul jika Maxbury memberikan perkhidmatan-perkhidmatan yang disebut dalam kl. 4.1 perjanjian penyelesaian. Penimbang tara memutuskan atas imbangan kebarangkalian bahawa Maxbury gagal membuktikan perjanjian cagaran yang didakwa dan menyimpulkan bahawa, menurut kl. 3 perjanjian penyelesaian, perjanjian penyelesaian telah menyelesaikan segala pertikaian berhubung perjanjian pembelian. Oleh itu, tuntutan Maxbury untuk

pelaksanaan spesifik perjanjian cagaran dan ganti rugi sebagai pengganti yang sama ditolak dengan kos. Penimbang tara menyatakan tuntutan Maxbury adalah berdasarkan perjanjian cagaran yang didakwa dan tidak berdasarkan, secara alternatif pada kl. 4 perjanjian penyelesaian. Dalam erti kata lain, Maxbury gagal memplidkan tuntutan alternatif melanggar kontrak berdasarkan dasar kl. 4. Oleh itu, penimbang tara memutuskan bahawa tribunal timbang tara terpaksa terhad pada isu sama ada perjanjian cagaran yang diplidkan wujud. Maxbury memplidkan saman pemula di Mahkamah Tinggi menuntut pengetepian award timbang tara bawah s. 37 dan/atau s. 42 Akta Timbang Tara 2005 ('ATT 2005'). Hakim Mahkamah Tinggi memutuskan, antara lain (i) award menangani pertikaian yang tidak dipertimbangkan oleh atau tidak terangkum dalam terma-terma hujahan timbang tara dalam maksud s. 37(1)(a)(iv) ATT 2005 yang membuatkannya harus diketepikan; dan (ii) kes ini tidak terangkum dalam skop s. 37(3) ATT 2005 dan satu-satunya pilihan adalah untuk mahkamah mengetepikan award secara keseluruhan. Oleh itu, rayuan ini terhadap keputusan Mahkamah Tinggi.

Diputuskan (membenarkan rayuan dengan kos)
Oleh Nallini Pathmanathan HMR menyampaikan penghakiman mahkamah:

(1) Fakta bahawa penimbang tara dituduh gagal mempertimbangkan isu material yang terdiri daripada bahagian penting pertikaian yang dirujuk pada timbang tara tidak membentukkan dasar hujahan bahawa penimbang tara telah melebihi skop pertikaian yang dirujuk padanya untuk timbang tara. Secara konsep, itu bukanlah satu jalan yang tersedia untuk pemohon bawah s. 37(1)(a)(iv) ATT 2005. Walau bagaimanapun, penimbang tara telah mempertimbangkan isu ini dalam konteks pertikaian telah diplidkan di hadapannya. Tuntutan berdasarkan kl. 4 perjanjian penyelesaian, yang tidak menyediakan kausa tindakan untuk wang yang dituntut oleh Maxbury. Penimbang tara telah mematuhi terma-terma rujukan timbang tara yang diberikan kepadanya. Penimbang tara telah menjawab isu dan memberikan alasan-alasannya. Tiada persoalan bahawa award menangani pertikaian yang tidak dipertimbangkan oleh atau tidak terangkum dalam terma-terma hujahan timbang tara. Setakat itu, proses membuat keputusan penimbang tara, iaitu perkara benar pertimbangan bawah s. 37(1)(a)(iv) ATT 2005, tidak boleh disalahkan.

(2) Tuntutan Maxbury adalah percubaan untuk mahkamah membuat semakan semula tuntutannya atas merit-merit substantif berhubungan kewujudan atau sebaliknya perjanjian cagaran. Ini bukan dasar untuk menuntut mengetepikan award bawah s. 37(1)(a)(iv) ATT 2005. Pihak yang sedang kalah tidak boleh bergantung pada apa-apa kekhilafan atau dianggap kekhilafan dalam adjudikasi pertikaian award untuk mengetepikan award. Menjadi satu kesilapan untuk melabel kegagalan menerima kewujudan perjanjian cagaran, atau juga pemakaian yang tidak

betul undang-undang oleh penimbang tara, sebagai terjumlah pada salah laku penimbang tara, sehingga boleh dikatakan award yang diberikan telah menangani pertikaian yang tidak dipertimbangkan oleh atau tidak terangkum dalam terma-terma hujahan timbang tara. Kekhilafan, seperti yang dicadangkan untuk dibawa oleh pemohon-pemohon, jika mempunyai merit, tidak mempunyai hubungan dengan s. 37(1)(a)(iv) ATT 2005 yang menangani isu bidang kuasa dan bukan kekhilafan-kekhilafan undang-undang.

(3) Hakim Mahkamah Tinggi telah terkhilaf dalam pendekatannya dan pemakaian s. 37(1)(a)(iv) ATT 2005. Dalam pemakaian sebegitu, mahkamah harus melakukan penelitian rujukan pada timbang tara dan dokumen-dokumen relevan yang lain untuk memastikan sama ada penimbang tara telah keluar dari skop subjek perkara rujukan pada timbang tara. Mahkamah tidak sepatutnya merampas kedudukan penimbang tara dalam menentukan pertikaian. Adalah jelas atas penelitian sebegitu bahawa pertikaian terjatuh luar skop hujahan mewajarkan campur tangan mahkamah.

(4) Penimbang tara tidak boleh dikatakan gagal atau enggan mempertimbangkan perkara yang dirujuk padanya untuk penentuan. Penimbang tara telah mempertimbangkan kl. 4 dan menentukan ini tidak memberikan kausa tindakan kerana tiada butiran-butiran berkenaan pelanggaran yang didakwa. Penimbang tara telah menyimpulkan bahawa kausa tindakan tidak dibuktikan. Tidak boleh dikatakan bahawa ini terjumlah sebagai 'perbezaan baharu' atau 'pertikaian yang tidak dipertimbangkan atau tidak terjumlah dalam terma-terma hujahan pada timbang tara.' Tiada dasar faktual untuk aduan bawah s. 37(2)(b) ATT 2005 iaitu pelanggaran keadilan asasi. Mahkamah berpendapat bahawa syarat-syarat ambang untuk seksyen ini tidak dipenuhi.

Case(s) referred to:

Kerajaan Malaysia v. Perwira Bintang Holdings Sdn Bhd [2015] 1 CLJ 617 CA ***(refd)***
Thai-Lao Lignite Co Ltd & Anor v. Government of the Lao People's Democratic Republic [2017] 9 CLJ 273 FC ***(refd)***

Legislation referred to:

Arbitration Act 2005, ss. 37(1)(a)(iv), (2)(b), (3), 42
Limitation Act 1953, s. 30(5)

For the appellant - KF Eee; M/s KF Ee & Co
For the respondent - Lee Chan Leong & Siew Ee Mei; M/s Chan Leong & Co
Amicus curiae - Nahendran Navaratnam, R Jayasingam & Wong Wye Wah; M/s Navaratnam Chambers

[Editor's note: Appeal from High Court, Kuala Lumpur; Originanting Summons No: WA-24NCVC(ARB)-24-07-2016 (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

Nallini Pathmanathan JCA:

[1] There were two appeals before us which emanated from arbitration awards which were set aside by the High Court. The present appeal, Appeal No. W-02(NCVC)(A)-776-04-2017 was first heard on 17 January 2018 and adjourned for decision. The following day on 18 January 2018, Appeal No. W-02(NCC)(A)-1429-07-2017 came up for hearing before us. Since both appeals concerned the application of the same provisions of the Arbitration Act (AA) 2005, we were of the view that they should be taken together.

[2] We requested assistance from *amicus curiae* from the then Kuala Lumpur International Arbitration Centre (KLRCA) (now known as the Asian International Arbitration Centre (AIAC)). We did so because we wanted a comprehensive review of the position in law. We invited parties to furnish the court with an independent view of the relevant law on the following questions:

(i) whether the intervention in these two appeals was warranted under the provisions of s. 37 and/or s. 42 of the AA 2005 as the case may be;

(ii) whether s. 37 and/or s. 42 of the AA 2005 can be utilised together or not, in a single application. The focus here was whether those two sections were to be utilised interchangeably or whether they were disparate provisions providing remedies for different modes of seeking to challenge an arbitral award. If the latter was the correct interpretation, then these two sections could not be utilised interchangeably.

[3] We also requested that a comprehensive coverage of relevant and recent case law be provided in the new submissions. We heard further submissions and delivered our decision for the two appeals together on 27 April 2018. We delivered separate grounds for the two appeals since they are not factually related.

[4] The salient facts for the present appeal are set out below. We adopted the factual matrix mainly from the written submissions of the appellant, as there is no material dispute in this respect.

Background Facts

[5] Huawei Technologies (Malaysia) Sdn Bhd (the defendant, 'Huawei') entered into an agreement with Maxis Broadband Sdn Bhd ('Maxis') for the provision of the next generation broadband project in Malaysia.

[6] For the purposes of carrying out the project, Huawei entered into an agreement known as 'purchase agreement for Maxis NGBB NDC Project, Agreement No. PAEMYS2410081104MM' dated 18 August 2010 ('the purchase agreement') with Maxbury Communications Sdn Bhd (the plaintiff, 'Maxbury').

[7] Maxbury had represented that it was fully experienced and competent to carry out the works set out in the purchase agreement. Under the purchase agreement, Maxbury was required to first conduct feasibility studies in respect of a product, "optical line terminal" ('OLT') as Huawei's subcontractor, pursuant to Huawei's main contract with Maxis. Subsequent to such studies only would Maxbury be required to provide a technical survey and high technical design and planning in respect of the market demand. This was necessary in order to determine the number of OLTs required to distribute to a particular quantity of fiber optics in a specified locality to meet demand for data networks.

[8] Under the definitions clause of the purchase agreement, it is stipulated that Maxbury would begin work only after receiving a purchase order ('PO') from Huawei.

[9] The work and terms of payment were stipulated in cl. 1 of the purchase agreement. The relevant table is reproduced below for ease of reference:

No.	Description of Work	Quantity	Unit	Unit Price (RM)	Subtotal (RM)
1	Policy & Procedure	1	Lump sum	229,000.00	229,000.00
2	Technical Overview	1	Lump sum	225,000.00	225,000.00
3	Demand Study	1	Lump sum	540,000.00	540,000.00
4	Fundamental Planning	32 OLTs	Per OLT	55,000.00	Klang Valley
				60,000.00	Outside Klang Valley[3]
Total (RM)					

Footnote 3 - Area outside Klang Valley shall be limited to area within Peninsular Malaysia.

[10] For items No. 1 - 3 in the above table, Huawei issued POs to Maxbury to enable them to carry out the works. Maxbury issued invoices for the works done for items No. 1 - 3 and Huawei duly settled full payment for the same, totalling RM994,000.

[11] For item No. 4, the purchase agreement clearly stipulated that the quantity of OLTs was to be 32. Huawei issued POs No. 1031015251, No. 1031019126 and 1031019127 in respect of the 32 OLTs. However, when the works under item No. 4 were submitted to Huawei, Maxbury represented that there were 60 OLTs in addition to the stipulated 32 OLTs ('the 60 additional OLTs').

[12] Pursuant to invoices issued by Maxbury, Huawei paid Maxbury in full for the 32 OLTs, amounting to RM1.177 million.

[13] Huawei then raised a dispute in relation to the additional 60 OLTs. Parties achieved an amicable settlement in the form of a settlement agreement dated 26 September 2011. Pursuant to the settlement agreement, Huawei paid Maxbury the sum of RM1.2 million for the 60 additional OLTs being full and final settlement of all Huawei's liabilities towards Maxbury. This payment is evidenced by the issuance of an invoice from Maxbury, Invoice No. 1031021147-1 dated 24 October 2011.

[14] In January 2015, more than three years after the settlement agreement was executed, and after Huawei paid the full and final settlement sum to Maxbury, Maxbury instituted Kuala Lumpur High Court Civil Suit No. 22NCVC-16-01-2015 ('Suit No. 16') against Huawei, claiming a sum of RM2.14 million purportedly owed to it by Huawei under the settlement agreement.

[15] Huawei obtained a stay of Suit No. 16 in order for the dispute to be referred to arbitration, pursuant to cl. 9 of the settlement agreement.

[16] Maxbury's main contention is that it was induced to sign the settlement agreement by the following representations (which Huawei denied making):

> That Maxbury shall be paid for the additional 60 OLTs, which translated into an additional sum of RM3.34 million which shall be paid by:
>
> (a) A sum of RM1.2 million to be paid after the Settlement Agreement being signed; and
>
> (b) The balance sum of RM2.14 million to be recouped and recovered through the subsequent award of contract for planning and design works pursuant to the Settlement Agreement.

[17] Maxbury pointed to cl. 4 of the settlement agreement in support of its contention that there was a representation that Maxbury would be entitled to a further RM2.14 million. For ease of reference, cl. 4 of the settlement agreement is set out below:

> 4. In consideration of the term of settlement in this Settlement Agreement, in particular as set out in clause 2, Maxbury agrees as follows:
>
> (i) Maxbury shall offer services for planning and design of fiber optic cable network to Huawei in the Asia Pacific region for work of up to Ringgit Malaysia Two Million One Hundred Forty Thousand (RM2,140,000) in value, which offer(s) shall be evaluated according to Huawei standard procurement process, and where accepted shall be subject to terms and conditions to be agreed between both parties;

A (ii) Maxbury acknowledges and affirms that it has completed all the Demand Study and Fundamental Planning for all twenty-six (26) areas in accordance with the requirements of Maxis Broadband Sdn Bhd, and undertakes that if so requested by Maxis Broadband Sdn Bhd or by Huawei due to any instruction or comment or requirement from Maxis Broadband Sdn Bhd that it shall fully
B comply with no further claims and at its own costs;

(iii) Maxbury undertakes to provide all necessary support to update the boundaries of the Fundamental Planning according to the boundaries of the detailed design in the Main Contract were [*sic*] necessary with no further claims and at its own costs;

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(iv) Maxbury undertakes to assist or support any communication between Huawei and Maxis Broadband Sdn Bhd, including presenting to the latter, on the Demand Studies or the Fundamental Planning as may be necessary in order that Huawei would be able to fulfil its requirements under the Main Contract,
D including the issuance of the acceptance certificates, with no further claims and at its own costs.

[18] Essentially, it was contended for Maxbury that there came into existence a collateral agreement and the basis for their claim was premised on the existence of such a collateral agreement. Huawei opposed Maxbury's
E claim on the following grounds:

(i) The terms of the settlement agreement did not impose any obligation or liability upon Huawei to pay Maxbury an additional RM2.14 million since pursuant to cl. 2 and cl. 3 of the settlement agreement, payment of RM1.2 million was in full and final settlement of all Huawei's
F liabilities, payments and obligations;

(ii) The additional RM2.14 million would only arise if Maxbury offered the services mentioned in cl. 4(i) of the settlement agreement;

(iii) There were no further services or projects offered by Maxbury at the
G material time;

(iv) Even if there were, it would still be subject to approval from Huawei in accordance with its standard procurement process.

[19] The learned arbitrator Dato' Kang Hwee Gee ruled that on a balance of probabilities, Maxbury failed to prove the alleged collateral agreement.
H The learned arbitrator held that by virtue of cl. 3 of the settlement agreement, the settlement agreement settles all disputes pertaining to the purchase agreement. Therefore Maxbury's claim for specific performance of the collateral agreement and compensation *in lieu* of the same was dismissed with costs.

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[20] The learned arbitrator stated that Maxbury's claim was premised on the purported collateral agreement and it was not based in the alternative on cl. 4 of the settlement agreement. In other words, Maxbury had failed to plead an alternative claim in breach of contract premised on the basis of cl. 4.

[21] Therefore, he held that the arbitral tribunal had to be confined to the issue of whether the collateral agreement as pleaded existed.

[22] Maxbury filed the present originating summons before the High Court seeking to set aside the arbitration award under s. 37 and/or s. 42 of the AA 2005. For ease of reference, s. 37 of the AA 2005 is reproduced below:

> s. 37 Application for setting aside
>
> (1) An award may be set aside by the High Court only if:
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> (a) the party making the application provides proof that:
>
> ...
>
> (iv) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration;
>
> ...
>
> (b) the High Court finds that:
>
> (i) the subject-matter of the dispute is not capable of settlement by arbitration under the laws of Malaysia; or
>
> (ii) the award is in conflict with the public policy of Malaysia.
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> (2) Without limiting the generality of subparagraph (1)(b)(ii), an award is in conflict with the public policy of Malaysia where:
>
> ...
>
> (b) a breach of the rules of natural justice occurred-
>
> (i) during the arbitral proceedings; or
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> (ii) in connection with the making of the award.
>
> ...

Decision Of The High Court

[23] The learned High Court Judge dealt with s. 37(1)(a)(iv) and s. 37(2)(b) of the AA 2005 as Her Ladyship found that having disposed of the matter under those provisions, there was no need to consider s. 42 of the AA 2005.

[24] In summary, the learned High Court Judge held as follows:

(i) The award dealt with a dispute not contemplated by or not falling within the terms of the submission to arbitration within the meaning of s. 37(1)(a)(iv) of the AA 2005 which made it liable to be set aside;

(b) The present case does not fall within the purview of s. 37(3) of the AA 2005 and the only option is for the court to set aside the award in its entirety;

(c) Having regard to s. 30(5) of the Limitation Act 1953, the period between 17 February 2015 (which was the date of the stay granted in Suit No. 16) and the date of the High Court order setting aside the arbitration award is to be excluded for the purposes of computation of the limitation period.

[25] Her Ladyship did not elucidate her reasons for so deciding. It appeared from the brief grounds of judgment that Her Ladyship's decision was made because she disagreed with the defendant's contentions and agreed with the plaintiff's contentions.

[26] Dissatisfied with the High Court decision, Huawei appealed.

Parties' Submissions Before the Court of Appeal

[27] Contrary to the finding by the learned arbitrator that cl. 4 of the settlement agreement was not pleaded, Maxbury's counsel pointed to all the references made to cl. 4 in the statement of claim for Suit No. 16 and Maxbury's submissions. Maxbury submitted that it had raised cl. 4 of the settlement agreement and therefore the learned arbitrator was wrong to say that its claim was premised "entirely" on the allegation of a collateral agreement between the parties, the existence of which Maxbury had failed to prove.

[28] Maxbury's counsel claimed that an injustice had been done to it because the learned arbitrator stated that "the settlement agreement settles all the disputes encountered by the parties pertaining to the purchase agreement but left in its wake an entirely new one under cl. 4." He contended that this finding left Maxbury "in the lurch" and "in the state of uncertainty" as to its position under the settlement agreement. He also raised his dissatisfaction that having expended much resources on the arbitration proceedings, Maxbury did not get an answer to the issue of whether there was a breach of cl. 4 despite the fact that this issue "was in play or in the arena in the proceeding". Maxbury is further prejudiced by the possibility of Huawei raising the bar of *res judicata* in resisting other litigation or arbitration proceedings premised on the same issue.

[29] Huawei argued that if Maxbury intended to plead an alternative cause of action premised on cl. 4, it had to plead the particulars of the breach under cl. 4 in clear terms, independently of the facts which it relied on to support its claim under the collateral agreement. Huawei submitted as Maxbury failed to do so, the learned arbitrator had not erred in his decision.

Assistance From *Amicus Curiae*

[30] We sought assistance from *amicus curiae*, largely by reason of the fact that, with respect, the submissions before us did not comprehensively consider or deal with the correct test or approach to be adopted when considering the setting aside of an arbitration award under s. 37 (as well as the now repealed s. 42) of the AA 2005. It is trite that an application to set aside an award is NOT an appeal and an approach akin to that utilised in an appeal is fundamentally erroneous.

[31] The relevant issue before us was whether the High Court had arrived at a correct decision in determining that the arbitrator had dealt with a dispute not contemplated by or not falling within the terms of the submission to arbitration within the meaning of s. 37(1)(a)(iv) of the AA 2005. We required assistance from *amicus curiae* on the approach to be adopted in relation to determining whether a particular dispute did fall within or outside of the scope of arbitration. While the generally accepted test is that of a 'new difference' we wanted further elucidation on this aspect. The submissions from the parties did not address this issue sufficiently or at all. If in fact Maxbury's complaint is studied, the complaint is that the learned judge failed to consider an issue that he ought to have, and that was material and before him. Such a complaint is directly at odds with s. 37(1)(a)(iv) which contemplates a situation where the arbitrator goes outside of the scope of matters falling for consideration in the arbitration, where the arbitrator strays from the purview of the dispute before him. In the instant, case the essence of the complaint is the reverse.

[32] The other matter of concern to us was the use of s. 37 to procure an examination of the award on its merits, which is barred and runs contrary to the underlying object of AA 2005. Again, we required assistance from *amicus curiae* as there was insufficient material in the submissions to assist us.

[33] We are grateful to *amicus curiae* for the following elucidation of s. 37 of the AA 2005:

> (1) The various limbs under sections 37(1) and (2) set out specific categories or pigeon holes by which an applicant can challenge an arbitration award.
>
> These categories or pigeon holes limit the scope of enquiry in an application to set aside the arbitrator's decision.
>
> (2) The categories for challenge under section 37 involve either pure questions of fact or questions of mixed law and fact.
>
> (3) The matters dealt with under section 37 fall into the following broad groups:
>
> (i) The validity of the arbitration agreement;

(ii) Jurisdiction of the arbitrator;

(iii) The manner in which the arbitration proceedings were conducted; and

(iv) The arbitrator's decision-making process.

(4) All these matters relate to the arbitral process. It does not relate to the substance of the award (save for section 37(1)(a)(iv) and (v) and section 37(1)(b)(ii).

(5) The challenge to the merits or substance of the award falls under section 42.

[34] We do not need to consider s. 42 as the High Court Judge did not base her decision on that provision. In fact, Maxbury's counsel Mr KF Ee strenuously objected to this issue being raised. In any case, s. 42 has been deleted by the Arbitration (Amendment) (No. 2) Act 2018 [Act A1569] which came into force on 8 May 2018.

Decision Of The Court Of Appeal

[35] We have considered all the submissions made. Our primary concern is the approach to be undertaken by a court when determining whether an award should be set aside under s. 37(1)(a)(iv) of the Arbitration Act (AA) 2005. The test to be applied has been set out in *inter alia*, the Court of Appeal case of *Kerajaan Malaysia v. Perwira Bintang Holdings Sdn Bhd* [2015] 1 CLJ 617 CA and the Federal Court decision of *Thai-Lao Lignite Co Ltd & Anor v. Government of the Lao People's Democratic Republic* [2017] 9 CLJ 273. The learned judge did not err in setting the test out as follows, namely "that the arbitrator must not decide on a "new difference" which is irrelevant to the claim.

[36] In the instant case, the complaint is that the arbitrator failed to determine an issue put before him in the reference through the pleadings, namely that there was a breach of cl. 4 of the settlement agreement. We have already pointed out that this is completely at odds with, or is directly contrary to any complaint that the arbitrator has in fact gone outside the purview of the scope of arbitration.

[37] Secondly, it appears to us that the question is one that relates directly to the merits of the claim. The question here is whether the civil court in exercising its jurisdiction under s. 37(1)(a)(iv) is required to undertake any form of review on the substantive merits of the case.

[38] In the textbook by Datuk Professor Sundra Rajoo (special contributor Dr Thomas R Klotzel) entitled '*UNCITRAL Model Law & Arbitration Rules - The Arbitration Act 2005 (Amended 2011 & 2018) and the AIAC Arbitration Rules 2018*'[1], the learned author set out the relevant principles in deciding a case under s. 37(1)(a)(iv) as follows (pp. 545 - 551):

37.83 The court will have to ascertain what matters were within the scope of submission to arbitration when exercising its discretion under this section. The court will be guided by the arbitration agreement and other relevant contractual provisions, the notice of request for arbitration, and the pleadings exchanged between the parties.

...

37.85 The Canadian Supreme Court in *Desputeaux v. Editions Chouette* [1987] Inc[58] stated that the mandate of an arbitral tribunal should not be interpreted restrictively limiting it to what is expressly set out in the arbitration agreement but should also cover "everything that is closely connected with that agreement".

...

37.96 The House of Lords in *Lesotho Highlands Development Authority v. Impregilo SpA*[65] had to interpret section 68(2) of the English Arbitration Act 1996, that is whether the arbitral tribunal had exceeded its powers in expressing the award in a currency other than that stipulated in the contract and in the matter of award of interest.

37.97 The court made a distinction between:

(1) an erroneous exercise of the powers available to an arbitral tribunal within its substantive jurisdiction leading to an error of law, which could be appealed under the equivalent of the former section 42 (if applicable) and not under the equivalent of section 37 of the AA 2005; and

(2) cases where the arbitral tribunal had **exceeded its substantive powers under the arbitration agreement, terms of reference or the relevant statute**, which would be a matter coming under the equivalent of section 37 of the AA 2005. (emphasis added).

37.98 The House of Lords held that the alleged errors, in that case, came under the first category. It reasoned that the ethics of the English Arbitration Act 1996 was an entirely new approach as regards the need for judicial restraint.

...

37.109 Applications for setting aside purportedly founded on erroneous interpretations of law and fact do not fall within the purview of section 37(1)(a)(iv) and (v) of the AA 2005. The Singapore Court of Appeal in *PT Asuransi Jasa Indonesia (Persero) v. Dexia Bank SA*[75] held that an arbitral tribunal, which erroneously declines jurisdiction, does not exceed its mandate in the meaning of Article 34(2)(a)(iii) of the UNCITRAL Model Law. The mere fact that the decision is wrong does not justify its setting aside under Article 34(2)(a)(iii).

...

A 37.111 However erroneous the reasons in the judgment may be, the courts have no jurisdiction to subsequently substitute its own interpretation of the law and facts.[77] The Bombay High Court in India in *Laxmi Mathur v. Chief General Manager MTNL*[78] held that it was trite that the parties constituting the arbitral tribunal bind themselves to accept the award as final and conclusive. Thus, the award cannot be set aside on the
B grounds that it is erroneous, the scope of which is beyond the setting-aside provisions of the AA 2005.

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[58] [2003] 1 SCR 178; [2003] SCC 17.

C [65] [2005] 3 WLR 129.

[75] [2006] SGCA 41.

[77] *Francis Klein Pvt Ltd v. Union of India* [1995] 2 Arb LR 298.

[78] [2000] (2) Arb LR 684 (Bom).

D ...

[39] It is therefore apparent that the fact that the arbitrator is accused of having failed to consider a material issue comprising an integral part of the dispute referred to arbitration does not form the basis for the contention that the arbitrator has exceeded the scope of the dispute referred to him for
E arbitration. Conceptually that is not an available avenue for an applicant under s. 37(1)(iv)(a) of the AA 2005.

[40] In any event, from the content of the award referred to earlier, it is apparent that the learned arbitrator did indeed consider this issue in the
F context in which the dispute was put and pleaded before him. The claim, he found, was premised on cl. 4 of the settlement agreement which provided no cause of action for the monies claimed by Maxbury. It is clear from the foregoing that the arbitrator complied with the terms of reference of the arbitration given to him. He answered the issue and gave his reasons for it. There was no question of the award dealing with a dispute that was not
G contemplated by or not falling within the terms of the submission to arbitration. To that extent, the decision-making process of the arbitrator, which is the true subject of consideration under s. 37(1)(a)(iv), cannot be faulted.

H **[41]** Shorn of its trimmings, Maxbury's claim was really an attempt to have the court review its claim on the substantive merits relating to the existence or otherwise of a collateral agreement. That is not a basis for seeking to set aside an award under s. 37(1)(a)(iv). Any error or perceived error in the adjudication of the dispute in the award cannot and ought not to be relied upon by the losing party to set aside the award.

I

[42] It is a fallacy to label the failure to accept the existence of a collateral agreement, or even an incorrect application of the law by the arbitrator, as amounting to a transgression of the arbitrator, such that it can be said that the award handed down deals with a dispute not contemplated by or not falling within the terms of submission to arbitration. Errors, such as those sought to be put forward by the applicants, even if they had merit, have no nexus with s. 37(1)(a)(iv) which deals with the issue of jurisdiction and not errors of law. If at all they are errors of fact and/or law, they are errors committed within the scope of his jurisdiction or mandate. Indeed, to hold otherwise would result in every award being subject to review, and in effect, appeal by the courts. That is precisely what the AA 2005 seeks to preclude.

[43] In summary therefore, the alleged failure to address an issue referred to him, fails in two aspects. Firstly, the learned arbitrator did in fact consider the issue, and for the reasons stated in his award, found that it fell outside the purview of the scope of reference to him. Therefore, it cannot be said that he did not consider the issue. Secondly, this application to set aside premised on s. 37(1)(a)(iv) cannot and ought not be utilised to review an award on its merits.

What Is The Approach To Be Adopted By The Courts When Determining The Scope Of An Arbitrator's Authority?

[44] When dealing with the scope of the arbitrator's authority and thereby jurisdiction, it remains a useful reminder that the provisions for recognition and setting aside an arbitration award under our AA 2005 are premised on the UNCITRAL Model Law, which in turn is based on the New York Convention, more particularly art. V. The grounds in our Model Law are relevant therefore to all international commercial arbitration. It follows therefore that arbitration awards ought not to be set aside lightly as is the position adopted in most other jurisdictions utilising or adopting the UNCITRAL Model Law.

[45] In the text entitled '*Transgression of the Arbitrators' Authority: Article V(1)(c) of the New York Convention*, the learned authors Mercedeh Azeredo da Silveira and Laurent Levy[2] commented as follows at pp. 668 - 669:

> 4.1.2. Examination of the Substance of the Award for the Sole Purpose of Determining Whether the Arbitrators Have Transgressed the Limits of Their Authority
>
> The fundamental rule according to which a court is prohibited from reviewing the substance of an arbitral award does not imply that the court before which enforcement is sought may not examine the award for the specific purpose of determining whether the arbitrators have exceeded the limits of their jurisdiction or their mandate. To determine whether, under Article V(1)(c) of the New York Convention, the arbitral tribunal has ruled

A on a difference not contemplated by the arbitration agreement or has awarded more than, or something different from, what was claimed, the court may have to look into the substance of the award. Such investigation is permitted to the extent that its purpose is limited to the determination of the scope of the arbitration agreement: 'the court's scrutiny of the award is strictly limited to ascertaining whether the award
B contains things which may give rise to a refusal of enforcement on [the ground] mentioned in Article V[(1)(c)]; it does not involve an evaluation by the court of the arbitrator's findings'[93] and may not lead to a determination, by the national court, on such findings. Thus, the issue examined by the courts is not whether the decision reached by the arbitral tribunal is well-founded or even how the arbitral tribunal has reached its
C decisions, but merely whether this decision transgresses the scope of the arbitrators' jurisdiction or mandate. In other words, the court must limit its investigations to what is strictly necessary for the interpretation of the scope of the arbitration agreement and the arbitrators' mandate.

D [93] Found at https://lk-k.com/wp-content/uploads/L%C3%A9vy-Transgression-of-the-Arbitrators%E2%80%99-Authority-Article-V1c-of-the-1958-New-York-Convention.pdf (accessed on 6.03.2019). Footnote 93 reads - van den Berg, The New York Arbitration Convention of 1958, supra note 2, at 271.

[46] Although the above passage relates to enforcement of the arbitral
E award rather than setting aside, the principle stated is still relevant to the present case because the passage relates to the rule to be applied when determining the scope or ambit of the arbitrators' authority. The learned authors make it clear that the court should look not at the merits of the award, but instead consider whether the arbitrator had exceeded the scope
F of the mandate referred to them. This issue of exceeding the scope of the mandate goes to the issue of jurisdiction.

[47] We have read the pleadings and the award and it appears to us that the learned judge erred in her approach and her application of s. 37(1)(a)(iv). In such an application, it is our view that the court should undertake a scrutiny
G of the reference to arbitration and other relevant documents (in this case the pleadings are relevant) to ascertain whether the arbitrator has gone well outside the scope of the subject matter of reference to arbitration. The court should not however usurp the position of the arbitrator in determining the merits of the dispute. In other words, it ought to be patently clear on such
H a scrutiny that the dispute falls outside the scope of the submission warranting the intervention of the court.

[48] As we understand the award, the learned arbitrator cannot be said to have failed or refused to consider a matter referred to him for determination. He has considered cl. 4 and determined that it did not afford a cause of action
I as there were no particulars of the alleged breach. In short, he concluded that that cause of action had not been made out. In our view, it cannot be said that this amounts to a 'new difference' or "a dispute not contemplated or not falling within the terms of submission to arbitration".

Conclusion

[49] There appears to be no factual basis for the complaint under s. 37(2)(b) namely a breach of natural justice. We are therefore not persuaded that the threshold requirements for this section have been met. Therefore, the appeal is allowed with costs. Costs of RM24,000 here and below to the appellant subject to allocatur. The deposit is refunded.

Endnotes:

1. Published by *Sweet & Maxwell in 2019*
2. Albert Jan van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation 312*, Kluwer (1981)